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No. 89-1911

In the

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT C. BELL, JR.,

Petitioner,

v.

JOHN P. LYDEN, M.D.,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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July 12, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondent maintains that the underlying proceeding does not present any issues for resolution by this Court. However, in the event this Court decides to grant the Petition, the only question presented to this Court is as follows:

> Should the award of the Arbitrator, granting Respondent specific performance for the purchase of real property under a contract, resulting from Respondent's timely exercise of his right of first refusal under a Partnership Agreement between Petitioner and Respondent, be annulled when Petitioner was afforded a full and fair opportunity to present evidence at the arbitration hearing, Petitioner has exhausted his state appellate rights without success, and there is no evidence of fraud, corruption, misconduct, partiality or arbitrariness on the part of Arbitrator?

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IN THE

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ROBERT C. BELL, JR.,

Petitioner,

v.

JOHN P. LYDEN, M.D.,

Respondent.

OPINIONS AND JUDGMENTS BELOW

An arbitration award, granting Respondent specific performance against Petitioner and directing Petitioner to convey certain real property of approximately 300 acres in the Town of Lewisboro, Westchester County, New York, to Respondent pursuant to an agreement between Petitioner and Respondent, was issued by Arbitrator John A. Humbach on

August 2, 1988 (the "Arbitration Award"). See Petitioner's Brief at 7a.

On August 16, 1988, the Arbitrator rendered a "Disposition of Modification" which corrected a minor computational error in the award of administrative expenses but otherwise affirmed the Arbitration Award.

A judgment confirming the Arbitration Award and denying Petitioner's motion to vacate the award was rendered by the Honorable Matthew F. Coppola, Justice of the Supreme Court, Westchester County, and entered in the Office of the Westchester County Clerk on September 28, 1988. See Petitioner's Brief at 3a.

On September 11, 1989, the Supreme Court, Appellate Division, Second Department, granted Petitioner's motion to enlarge the time to perfect his appeal taken on October 28, 1988, and to serve

and file his Brief and the Record on Appeal, until October 11, 1989. However, on November 16, 1989, the Appellate Division, Second Department denied Petitioner's second request for an enlargement of the time to perfect his appeal and dismissed the appeal sua sponte. See Petitioner's Brief at 2a.

On February 20, 1990, the Court of Appeals denied Petitioner's motion for leave to appeal from the Appellate Division's dismissal of the appeal. See Petitioner's Brief at 6a.

JURISDICTIONAL STATEMENT

There is no basis for this Court to assume jurisdiction of this case. This was an action for specific performance of an agreement between the Petitioner, Robert C. Bell, Jr., Esq., and the Respondent, John Lyden, M.D., two business partners. Contrary to Petitioner's

contention, the arbitration proceeding and award do not involve any constitutional issues. See Petitioner's Brief at 9. Further, no federal cases, questions of federal law or issues with nationwide importance are involved in the dispute between the parties. Petitioner is simply using the certiorari procedure to relitigate the merits of the arbitration proceeding. These circumstances do not confer upon this Court jurisdiction to review the underlying decision.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Contrary to Petitioner's representation, the only statute having any bearing on Petitioner's rights and the issues herein is Section 7511 of the New York Civil Practice Law and Rules (McKinney 1980), which is reproduced in the Appendix to Petitioner's Brief at 4a-

5a. CPLR § 7511 provides that an arbitrator's award can be vacated or modified only in the limited circumstances where there was corruption, fraud or misconduct involved in obtaining the award, the arbitrator was partial, or the arbitrator exceeded his authority.

FACTUAL STATEMENT OF THE CASE

In 1964, Respondent's father, John M. Lyden ("John Lyden"), formed a partnership with Petitioner for the purpose of acquiring, holding and selling real property. The Partnership, known as "Lewisboro Associates Company," acquired two parcels of land in the Town of Lewisboro of approximately 300 acres (the "Partnership property"). This property was contiguous to approximately 100 acres of property owned by Petitioner individually.

The Partnership Agreement between John Lyden and Petitioner authorized either partner to sell any portion of the Partnership property providing the "selling partner" offered the property to the "non-selling" partner first, on the same terms and conditions of any offer made by the selling partner to a third party. Under the Partnership Agreement, the right of first refusal had to be exercised within 30 days of the notice of the third-party offer to the non-selling partner.[1]

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[1] The Partnership Agreement between Petitioner and John Lyden (Respondent's father) was entered on November 4, 1960 and thereafter amended on August 3, 1964. One of the material provisions of the amended Agreement provided that each partner would have 30 days (as compared to 72 hours under the 1960 Partnership Agreement) within which to exercise his right of first refusal. On December 16, 1979, Respondent's father and Petitioner entered into an agreement entitled "Bill of Sale and Assignment" whereby Respondent's father assigned to Respondent his interest in the Partnership Agreement. Petitioner consented to the assignment.

On August 6, 1987, Petitioner entered into a Contract with Raymon Rezai (now Hassan Rezaeizadeh Firouzabadi) for the sale of approximately 75 acres of the Partnership property ("Rezai Contract") which was contingent upon Respondent's waiver of his right of first refusal. On August 8, 1987, Petitioner sent Respondent a copy of the Rezai Contract as required by the Partnership Agreement.

At Respondent's direction, on August 24, 1987, Respondent's counsel, Peter R. Cherneff, Esq. (a member of Shamberg Marwell Cherneff Hocherman & Davis, P.C.), telephoned Petitioner and advised him that Respondent had decided to exercise his right of first refusal and purchase the 75 acres. Mr. Cherneff confirmed this fact in a certified letter to Petitioner dated August 25, 1987. Respondent also personally advised Petitioner of his

decision to purchase the Partnership property on August 24, 1987.

Thereafter, and still within the 30 day period of the option, Respondent advised Petitioner on at least four additional occasions (personally and through Mr. Cherneff) that he wanted to purchase the property.

Petitioner refused to consummate the transaction in accordance with the provisions of the Partnership Agreement. In December 1987, Respondent filed a Request for Arbitration with the American Arbitration Association seeking an order compelling Petitioner to comply with his obligations under the Partnership Agreement and to convey to Respondent his right, title and interest in the 75 acres.

The Arbitration proceeding was conducted in four sessions before Arbitrator John Humbach, Esq. Both

Petitioner and Respondent were represented by counsel and presented evidence during the hearing. On August 8, 1988, Arbitrator Humbach issued an award which, in essence, directed Petitioner to convey title to the 75 acres to Respondent, subject to certain conditions.

Petitioner unsuccessfully challenged the Arbitrator's Award in a proceeding commenced in the Supreme Court, Westchester County, and on appeal to the Supreme Court, Appellate Division, Second Department and the Court of Appeals.[2]

SUMMARY OF ARGUMENT

This is not an appropriate case for this Court to grant a writ of certiorari as the case possesses none of the features that ordinarily must be present in cases

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[2] The procedural history of the proceeding is set forth in the section entitled "Opinions and Judgments Below" at page 1, supra.

for which such writs are granted. Specifically, the underlying arbitration decision does not conflict with the decision of any federal court of appeals or state court of last resort. Nor does the case involve any questions of federal statutory or constitutional law or so far depart from the "accepted and usual course of judicial proceedings" as to warrant this Court's exercise of its supervisory powers. The fact is that this case involves only the enforcement of the provisions of a Partnership Agreement and a Contract of Sale related to certain real estate located in the Town of Lewisboro in Westchester County, New York.

A review of the Petition reveals that Petitioner seeks only to relitigate the merits of the underlying proceeding and to renew this Court's consideration of certain unrelated exclusionary zoning

issues raised in a "Petition for Writ of Mandamus" filed by Petitioner with this Court over five years ago.

Petitioner had a full and fair opportunity to present evidence at the arbitration proceeding and, in fact, did so. He has exhausted his appellate rights and has failed to have the award set aside. Petitioner should not be permitted to invoke this Court's jurisdiction to review the merits of a case decided almost two years ago.

In addition, Respondent should be awarded damages and double costs against Petitioner. The Petition is clearly frivolous. No one reviewing the matter in light of the considerations for a writ of certiorari set forth in Rule 10 of the Rules of the Supreme Court of the United

States,[3] could have reasonably concluded that the record supports this Petition. Tellingly, Petitioner himself fails to address how this case fits into the considerations set forth in Supreme Court Rule 10. Accordingly, Petitioner should be responsible for Respondent's fees and expenses in opposing this frivolous Petition.

REASONS FOR DENYING THE WRIT

POINT I

NONE OF THE CONSIDERATIONS GOVERNING THIS COURT'S REVIEW OF A PETITION FOR WRIT OF CERTIORARI ARE PRESENT HERE AND, THEREFORE, THE PETITION MUST BE DENIED

This Court has precisely defined the considerations governing its review on

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[3] All references in this Brief to the Rules of the Supreme Court of the United States will be designated "Supreme Court Rule ____."

writ of certiorari in Supreme Court Rule 10, as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

None of these considerations is present here.

Clearly, the decision at issue was not rendered by a federal court of appeals or a state court of last resort. This case was decided by an arbitrator acting pursuant to the authority established by the New York State Legislature. In accordance with Article 75 of the CPLR, the decision was confirmed by the Supreme Court, Westchester County. Petitioner's appeal to the Supreme Court, Appellate Division, Second Department, from the decision confirming the award, was dismissed sua sponte for failure to prosecute and the New York Court of Appeals refused to grant Petitioner permission to appeal. The decision does not conflict with the decision of any federal court of appeals or state court of last resort.

Additionally, no federal question is at issue. The Partnership Agreement provides that "[t]he parties shall be partners under the laws of New York only." See Petitioner's Brief at 18a. By contracting to have their relationship and rights defined exclusively by the laws of New York, the parties eliminated the possibility that a question of federal law would be raised in a dispute arising from the Agreement.

The Demand for Arbitration (the "Demand") filed by Respondent described this private contract dispute as follows:

> Pursuant to the agreement between the parties . . . Claimant properly exercised his option to purchase certain premises in accordance with the right of first refusal pursuant to a certain Contract of Sale. Robert C. Bell, Jr., Esq. has refused to perform his obligations under said Contract or to convey the land to Claimant that is the subject thereof.

The relief sought was stated as follows:

> An order of the arbitrator compelling Robert C. Bell, Jr., Esq. to comply with the obligations of the Partnership Agreement and to take all steps and acts necessary to convey all right, title and interest in the subject premises to the Claimant.

Clearly, no federal question or constitutional issue is framed by the Demand.

Moreover, the actions of a state entity are not in question. Therefore, no constitutional violation could be at issue.

A review of Arbitrator Humbach's decision (Petitioner's Brief at 7a) confirms that no federal statutory or constitutional law issues were disposed of in this action.

The validity and enforceability of an arbitration award are regulated by State law. The New York State Legislature has

enacted a comprehensive scheme of legislation (Article 75 of the CPLR) defining the procedures governing arbitration proceedings, the enforceability of arbitration awards and the narrow circumstances under which such awards can be reviewed on appeal. Consequently, there is a comprehensive line of case law under Article 75. On appeal, this Court would have to judge the validity of the award according to the well established standards under New York Law.

This is not a proper case for this Court's review for the additional reason that the Arbitrator did not deviate from the ordinary course of judicial proceedings. The undisputed fact is that both parties had an adequate opportunity to and did present evidence to the arbitrator and to cross-examine witnesses

during the hearing. The Arbitrator's decision, which was confirmed by the Supreme Court, Westchester County, reflects that the Arbitrator gave due consideration to all of the evidence and issued findings supported by the record.

Finally, no important question of federal law was considered during the arbitration. Arbitrator Humbach simply determined the parties' rights under the private real estate Partnership Agreement. Tellingly, the New York Court of Appeals determined that the case did not even present issues of state-wide significance so as to warrant that Court's review.

Petitioner's argument that the arbitration proceeding is of national significance because it involves issues of exclusionary zoning and unconstitutional municipal approval processes is disingenuous and must be rejected. See

Petitioner's Brief at 3-4. The constitutionality of the zoning policies and procedures of the Town of Lewisboro was not even a marginal issue in the underlying proceeding. As the caption confirms, no municipal body of the Town of Lewisboro was a party to this proceeding. Further, the Town's zoning laws have no bearing on the parties' contractual rights and, consequently, cannot be treated as a justiciable issue for this Court.

It is readily apparent that Petitioner is using the certiorari procedures to renew this Court's review of the same issues he previously raised before this Court five years ago in his "Petition for Writ of Mandamus" (No. 84-1709) which this Court apparently did not grant. According to Petitioner, he previously presented to this Court the issues of whether Lewisboro's zoning law

requiring a minimum of one acre for every single-family residence was legal and whether municipal bodies should be required to process development applications within a certain period of time. See Petitioner's Brief at 7. This case involves no facts relating to Lewisboro's zoning laws and Petitioner's attempt to resurrect such issues must be rejected.

Supreme Court Rule 14.5 provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition. (Emphasis added).

Petitioner's Brief is unintelligible and convoluted and, as the foregoing illustrates, relies on factual misstatements and extraneous arguments. Not once does Petitioner address the

considerations governing the Court's review of the writ or how his constitutional rights were abrogated.

Moreover, the procedural history of the case cannot be gleaned from Petitioner's recitation of the "Judgment and Opinions Below" and "Statement of the Case." Such sections are incomplete, at best.

Petitioner's arguments have not been presented to this Court with any semblance of "accuracy, brevity, and clearness." For this additional reason, the Petition should be denied.

POINT II

EVEN IF THIS COURT WERE TO GRANT THE WRIT OF CERTIORARI, THE ARBITRATOR'S DECISION WOULD HAVE TO BE AFFIRMED AS THE DECISION IS SUPPORTED BY THE RECORD

It is evident that Petitioner's primary objective is to relitigate the merits of the underlying proceeding.

However, in the absence of a more compelling reason, mere dissatisfaction with the result of the action does not qualify this case as one for which a writ of certiorari should be granted.

Notwithstanding, if this Court granted the writ, the governing precedent would require an affirmance of the Arbitration Award. Under New York law, courts possess very limited and narrow powers of review of arbitration awards, particularly when the arbitration was voluntary, as was the case here.[4] The

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[4] A voluntary arbitration is one in which the parties agree, by contract or otherwise, to submit any dispute to arbitration. See generally Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 500, 34 N.Y.S.2d 863 (1970). A compulsory arbitration proceeding is one in which the Respondent must participate if the Petitioner commences the arbitration. See, e.g., New York Gen. Bus. Law § 198-a (McKinney 1988 & Supp. 1990). (Section 198-a, known as the "New Car Lemon Law," requires that a manufacturer participate in an arbitration requested by a consumer

Appellate Court cannot review and modify an arbitration award for errors of fact or law (Security and Law Enforcement Employees, Dist. Council 82 v. Albany County, 116 Misc. 2d 766, 455 N.Y.S.2d 1004, 1005 (1982), aff'd, 96 A.D.2d 976, 466 N.Y.S.2d 841 (3d Dep't 1983), aff'd, 61 N.Y.2d 965, 475 N.Y.S.2d 280 (1984)), or disregard for the plain or apparent meaning of the words of an agreement (Maross Construction Inc. v. Central New York Regional Transportation Authority, 66 N.Y.2d 341, 345, 497 N.Y.S.2d 321 (1985)). Essentially, a court may not conduct a de novo review of the merits of the proceeding. Wilkens v. Allen, 169 N.Y. 494, 498, 62 N.E. 575 (1902).

The breadtn of an Arbitrator's authority and the concomitant deference

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alleging a Lemon Law type claim.).

given to his decision is explained in the decision of the Court of Appeals in Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 473 N.Y.S.2d 774 (1984).

> He [the arbitrator] may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties.

Id., 61 N.Y.2d at 308 (citations omitted).

Relying on the standards set forth in CPLR § 7511, the Court of Appeals further explained:

> The only basis upon which an award can be vacated at the behest of a party who participated in the arbitration or was served with notice of intention to arbitrate is that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was

> not waived (CPLR 7511, subd. [b], par. 1).

Silverman, 61 N.Y.2d at 307 (emphasis added).

Petitioner does not argue that there was any corruption, fraud or misconduct here. Instead, he belatedly claims only that the Arbitrator was partial because he was a first year law professor of Respondent's counsel, Robert Davis, Esq., over ten years earlier.

Notably, this is the first time that Petitioner has ever raised the impartiality of the arbitrator as a grounds for vacating the Arbitration Award. The law is clear that a party who proceeds with an arbitration hearing when he believes the arbitrator may be partial, waives his right to object to the award on the ground of partiality. J.P. Stevens &

Co., Inc. v. Rytex Corp., 34 N.Y.2d 123, 129, 356 N.Y.S.2d 278 (1974).

Prior to the commencement of the hearing, Mr. Davis disclosed to Petitioner that he had been one of several hundred students in Arbitrator Humbach's Real Property class and that he had no other relationship with the Arbitrator. Petitioner admits that he was so advised and never objected to Arbitrator Humbach. See Petitioner's Brief at 17. Thus, Petitioner's argument, raised for the first time here, must be rejected.

It should be noted that the Arbitration Award has been upheld on appeal. See page 1, supra. As Petitioner has offered no evidence that the arbitrator's decision should be set aside, the Petition should be denied.

POINT III

THIS PETITION IS FRIVOLOUS AND THE COURT SHOULD AWARD RESPONDENT DAMAGES AND DOUBLE COSTS

Supreme Court Rule 42.2 states that:

> When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent . . . just damages and single or double costs.

This Court has awarded a respondent fees and costs under Rule 42.2 in cases where (i) the petitioner showed disregard for judicial procedures including by filing untimely and inappropriate motions (Clark v. Florida, 475 U.S. 1134 (1986)); (ii) the arguments offered in support of the writ of certiorari involved matters of state law, the certiorari procedure was used as a device to delay the resolution of the matter and the alleged constitutional violations were raised for the first time in the petition (Park Avenue Investment & Development, Inc. v.

Barkheimer, 471 U.S. 1108 (1985)); and (iii) no good faith effort was made in the petition to demonstrate why the underlying decision should be reversed (Haggerty v. Keller, 474 U.S. 968 (1985)).

As the foregoing discussion demonstrates, similar circumstances are present here. Petitioner has repeatedly neglected to follow judicial procedures in this case, having failed to perfect his appeal to the Appellate Division, Second Department within a timely fashion. Moreover, the federal statutory and constitutional issues he poses herein are being raised for the first time. Further, this case involves issues of state law only. Petitioner has had a full and fair opportunity to litigate his rights and has availed himself of his appellate rights, although without success. Once again, he

has failed to demonstrate why the Arbitration Award is invalid.

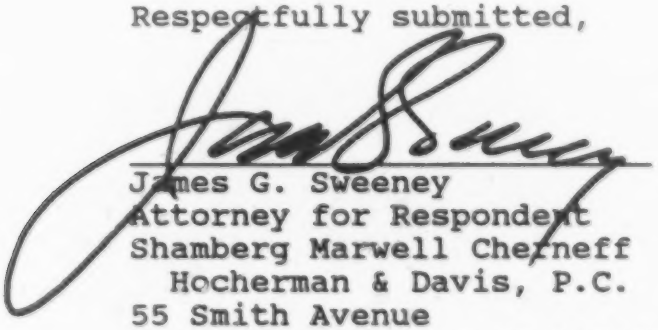
If ever there was a frivolous Petition, this is it. Respondent respectfully requests that, in addition to denying the Petition, the Court award him damages and double costs against Petitioner in accordance with Supreme Court Rule 42.2.

CONCLUSION

For all of the foregoing reasons, Respondent maintains that the granting of the Petition under the circumstances of this case would be an inappropriate use of this Court's judicial resources and an improper exercise of its jurisdiction, and would work an injustice on Respondent. Respondent requests that the Court deny the Petition and award him damages, including reasonable attorney's fees, and double costs.

DATED: July 12, 1990
Mount Kisco, New York

Respectfully submitted,



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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jacqueline Simone , being duly sworn, deposes and says he is over the age of 18 years and is not a party in this action; that on the 16th day of July, 1990, the deponent served three copies of the annexed Brief in Opposition in the following manner:

By mailing the same in a sealed envelope with postage prepaid thereon, in a post-office of the United States Postal Service within the Sate of New York, located at 99 Church Street, New York, New York, addressed to the last known address of the addressee as indicated below:

TO: Peter J. Kiernan, Esq.
Attorney for Petitioner
Robert C. Bell, Jr.
Berger & Steingut
600 Madison Avenue
New York, New York 10022

Jacqueline Simon

Sworn to before me this
16th day of July, 1990.

James F. Coonan
Notary Public

JAMES F. COONAN
NOTARY PUBLIC, State of NY
Residing in New York County
My Commission Expires July 25, 1990
Registration No. 4938738